Supreme Court, U. S.
FILED
JUN 13 1974
MICHAEL RODAK, JR., CLERK

APPENDIX

In The

Supreme Court of the United States

October Term, 1973

No. 73-1219

Interstate Commerce Commission,

Appellant

—v.—

Oregon Pacific Industries, Inc.; Arthur A. Poen Co.; Timberlane Lumber Co.; Chapman Lumber Co.; North Pacific Lumber Co.; and American International Lumber Co.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

FILED FEBRUARY 7, 1974
PROBABLE JURISDICTION NOTED APRIL 29, 1974

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1210

INTERSTATE COMMERCE COMMISSION,
Appellant

—v.—

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO.,
Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

The motion of Western Railroad Traffic Association for leave to file a brief, as *amicus curiae*, is granted. In this case probable jurisdiction is noted.

APRIL 29, 1974

UNITED STATES DISTRICT COURT

Civil Docket 73-386

GOODWIN, EAST, SKOPIL

Jury demand date:

[Received May 10, 1974, Office of General Counsel]

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

For plaintiff:

SEYMOUR L. COBLENS
510 Corbett Bldg. (4) 226-6695

For defendant:

JACK G. COLLINS
CHARLES H. WHITE, JR.
ICC
12th & Constitution
Wash., D. C. 20423

Statistical Record	Costs	Date	Name or Receipt No.	Rec.	Disb.
J.S. 5 mailed */5/73	Clerk	5-15	#16712 US Treas	15.00	
J.S. 6 mailed 11/5/73	Marshal				15.00
Basis of Action: injunction against enforcement of order of ICC	Docket fee				
	Witness fees				
Action arose at:	Depositions				

DATE	PROCEEDINGS
1973	
May 15	Filed Complaint
15	Filed Motion for Temporary Stay
15	Issued summons
24	Filed Notification and Certificate that this suit requires the formation of a District Court of three judges m-5/24/73 ORS 5/24/73
17	Filed return of service of s/c exec 5/16/73-U.S. Atty
25	Record of hrg on Temporary Restraining Order ORS
25	Filed Mot of Interstate Commerce Commission to Intervene
29	Filed Order designating U.S. Circuit Judge and United States District Judges to determine this cause: GOODWIN, EAST AND SKOPIL m-6/5/73 CHAMBERS
June 6	Filed Order that mot for temporary restraining order be DENIED and Motion of Interstate Commerce Commission to intervene is GRANTED m-6/7/73 ORS 6/7/73
13	Filed Plaintiffs' Trial Brief (copies to Judges)
July 6	Record of Briefing Schedule: final brief due 8/1/73, statement of agreed facts to judge 8/10/73. Order setting oral argument before 3 judge panel 8/16/73 3:00 p.m. (ntfd) ORS
13	Filed deft's Motion for Extension of Time to and incl 8/14/73 in which to answer. (copies to judges)
13	Filed Order granting above motion for extension of time 7/16/73 (copies to Judges) OJS 7/17/73
23	Filed Joint Brief of the USA and the Interstate Commerce Commission (copies to judges)

DATE	PROCEEDINGS
1973	
30	Filed Pltff's Reply Brief (copies to Judges)
Aug. 10	Filed Stipulation of Facts (copies to Judges)
13	Filed Joint Answer of the United States of America and the Interstate Commerce Commission
16	Record of Oral argument-under advisement
Oct. 18	Filed Memorandum of Decision m 10/19/73 (copies to judges) ATG, WGE, ORS 10/19/73
18	Filed Decree that Service Order #1134 entered by ICC 5/3/73 is set aside, vacated and that ICC is permanently restrained and enjoined from enforcement of said Order. Pltffs have and recover costs. m 10/19/73 (copies to judges) ATG, WGE, ORS 10/19/73
24	Filed Bill of Costs
Nov. 8	Filed Taxation of costs of $18.00.
Dec. 17	Filed Notice of Appeal by ICC from Order entered October 19, 1973 (dated October 18, 1973)
19	Mailed conformed copy of Notice of Appeal to Seymour Coblens and Jack Collins
19	Notified all parties, including Court Reporter, of mailing date
1974	
Jan. 15	Filed Release of Record to an Attorney for Twenty-Four Hours m 1/16/74 RCB 1/16/74
Feb. 13	Mailed Record to the Supreme Court
May 6	Filed true copy of Order from Supreme Ct. re jurisdiction

SEYMOUR L. COBLENS
Attorney at Law
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Portland, Oregon 97204
Telephone: 226-6695

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-3866

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

COMPLAINT

Come now Plaintiffs and for their Complaint and on behalf of all others similarily situated, allege as follows:

I

The Plaintiffs are corporations organized and existing under the Laws of the State of Oregon and are all engaged in the wholesale lumber business. In their business they cause the lumber purchased and sold by them to be transported from their source of supply to their customers throughout the United States. The rates charged by railroads for transportation and for ancillary services, including demurrage, determine to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and to the Plaintiffs, as well as to all other persons engaged in similar lines of business. The number of such persons affected by the subject matter of this action is so large that it would be impracticable to bring them all before this Court. The Plaintiffs are

fairly representative of the class of persons on whose behalf this action is brought pursuant to Rule 23 of the Federal Rules of Civil Procedure.

II

This action is for an Injunction against the enforcement of an order of the Interstate Commerce Commission and the jurisdiction of this Court is based upon the provisions of 28 USC 2321-2325.

III

On May 8, 1973, the Interstate Commerce Commission purportedly on the basis of its opinion that an emergency exists requiring immediate action to promote car service, issued Service Order No. 1134, effective May 15, 1973. A copy of said Service Order is attached to this Complaint, made a part hereof and marked Exhibit "A".

IV

The said Service Order was issued by the Interstate Commerce Commission without legal authority therefor because:

1. In truth and in fact no "emergency" existed requiring the elimination of Public Hearings and findings of fact by the Commission with respect to the necessity for such order;
2. It applies to the lumber and plywood industries and unreasonably and arbitrarily discriminates against said lumber and plywood industries;
3. The said Order purports to suspend, without public hearing or any other action and without good cause shown, regularly and duly filed tariffs of the Commission relating to joint and through rates for lumber and plywood in violation of 49 USC 6(3); and
4. The said Order, while it purports to deal with car service, in truth and in fact deals with transportation charges and the Commission has no authority to change transportation charges by the issuance of a service order in the manner attempted by the Commission.

V

The enforcement of Service Order No. 1134 insofar as it affects the Plaintiffs, and the class of persons they represent, will cause them irreparable damage, and there is no adequate remedy available to the Plaintiffs other than the action of this Court in annuling and setting aside the provisions of said Service Order and enjoining the enforcement thereof.

WHEREFORE, Plaintiffs pray this Court for a judgment enjoining the enforcement of Service Order No. 1134, and further pray this Court for an Interlocutory Order of Injunction against the said Service Order and for such other and further relief as to the Court may seem just and proper.

/s/ Seymour L. Coblens
SEYMOUR L. COBLENS
Attorney for Plaintiffs
510 Corbett Building
Portland, Oregon 97204
Telephone: 226-6695

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS
PART 1033—CAR SERVICE

SERVICE ORDER NO. 1134

LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D. C., on the 3rd day of May 1973

It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment or other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application*:

(i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(ii) *Definition of Lumber and Plywood*

The term "lumber and plywood" as used in this order means lumber, veneer or forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) *Holding of Cars for Diversion, Reconsignment, or Disposition Orders Restricted*:

Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holidays listed in Item 25 of General Car Demurrage Tariff 4-J, I.C.C. H-59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consignor, or owner, will be subject to the full local or joint (not proportional, reshipping, or transshipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given

to carrier, plus all other applicable charges previously or subsequently accruing. (See exception.)

(3) *Exception: Cars at Hold Point on May 15, 1973.*

A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.*

The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the

American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]

SEYMOUR L. COBLENS
Attorney at Law
510 Corbett Building
Portland, Oregon 97204
Telephone: 226-6695

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No.

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

AFFIDAVIT

[Received May 22, 1973, Office of General Counsel]

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, ALEX M. CHEATHAM, being duly sworn depose and say:

1. I am the Director of Traffic of Oregon Pacific Industries, Inc., one of the Plaintiffs in the above entitled action, and an fully familiar with rates and charges for lumber and plywood and the Rules and Regulations applicable thereto with respect to rates and charges by railroads throughout the United States.

2. This Affidavit is in support of a Motion for Temporary Stay of the effective date of Service Order No. 1134 issued by the Interstate Commerce Commission on May 8, 1973.

3. Pursuant to 49 USC 6(3) the Interstate Commerce Commission has approved through and joint rates and charges which have been filed and published by the railroads of the United States affecting lumber and plywood. Such publication provides for such charges from points between the Pacific Coast of the United States and points throughout the United States for transportation of lumber and plywood. These through rates provide an economic and efficient rate structure for transportation of lumber and plywood by railroad between those points and are substantially lower than the sum of the various local rates between such points. The effect of Service Order No. 1134 is to destroy the application of the through rates previously existing with respect to lumber and plywood and substantially increase the cost of transportation between points on the Pacific Coast and other points throughout the United States for lumber and plywood, when shipments of such commodities are delayed at diversion points beyond 120 hours. The purported purpose of Service Order No. 1134 is to alleviate a shortage of rail cars which allegedly hinders the transportation system of the United States. To illustrate the effect of this Order there is attached to this Affidavit and made a part hereof a schedule of examples of shipments of lumber and plywood.

4. The economic effect of the order on the Plaintiffs and other similar situated parties will be catastrophic and will seriously and irretrievably affect the economy of the Northwest. The Interstate Commerce Commission does not set forth any specific statutory authority for its actions. I have been advised that there does not appear to be any. While the order is directed specifically against the lumber and plywood industry, there is evidence that more cars are being delayed in the moving of grain for export than by the lumber and plywood industry. To illustrate the irrationality of the order and to demonstrate the fact that the lumber and plywood industry is the victim of the rail car shortage rather than its cause, there is attached hereto a report to the stockholders of the Southern Pacific Railroad by the President of the Southern Pacific, dated May, 1973, set-

ting forth the fact that the prime cause of the car shortage is the shipment of grain to Russia.

5. The Commission has authority to require railroads to return cars to their ownership lines but it has not effectively exercised its authority.

6. The effect of this order is to unreasonably, arbitrarily and without statutory authority require the lumber and plywood industry to perform its business practices within an arbitrary limited time. This limitation is not imposed upon any other industry and in fact is not a reasonable limitation due to many factors beyond the control of the industry.

/s/ Alex M. Cheatham
ALEX M. CHEATHAM

Subscribed and sworn to before me this 15th day of May, 1973.

/s/ Seymour L. Coblens
Notary Public for Oregon
My Commission expires:
12/15/76

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1033—CAR SERVICE

SERVICE ORDER NO. 1134

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It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment or other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

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(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

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Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holidays listed in Item 25 of General Car Demurrage Tariff 4-J, I.C.C. H-59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consignor, or owner, will be subject to the full local or joint (not proportional, reshipping, or transshipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given

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(b) *Rules and regulations suspended.*

The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended; 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15(4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agree-

ment under the terms of that agreement, and upon the American Short Line Railroad Association; and that notice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D. C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division 3.

ROBERT L. OSWALD
Secretary

[SEAL]

QUARTERLY REPORT TO STOCKHOLDERS

Three months ended March 31, 1973

[Picture]

Full train of new Southern Pacific box cars en route to customers in Oregon

SOUTHERN PACIFIC

The Annual Meeting of Stockholders of Southern Pacific Company will be held May 16, 1973, at Wilmington, Delaware. The report on the meeting will be included in a special "This is Southern Pacific" issue of our company magazine, which will be mailed to stockholders in June.

SOUTHERN PACIFIC COMPANY
One Market Street

TO THE STOCKHOLDERS:

Although the national economy has been running at a good rate so far in 1973, Southern Pacific's first quarter railroad revenues did not show commensurate gains, primarily because of a national freight car shortage which kept us from moving all of the available business. That, along with increased operating costs and delays in getting offsetting freight rate increases, resulted in a decline in net income from 74 cents a share in the first quarter of 1972 to 53 cents a share for the same period this year.

It is particularly disappointing to report a drop in forest products revenue, compared to a year ago, with the building market so active. Lumber and plywood shipments should have gained significantly, but we have been faced since February with an acute shortage of freight cars and our shippers have been forced to use more expensive modes of transportation for some of their shipments. Southern Pacific simply has been unable to get enough of its fleet quickly back on its own lines to move all the forest and paper products traffic we are offered. The same has been true, to a limited extent, for canned food traffic.

Accentuating the problem in recent months, of course, has been the mammoth Russian purchase of U.S. grain. Southern Pacific is not a major grain hauling railroad, so it has not shared in the benefits of the traffic, but the diversion of cars to the grain movement and congestion in many ports and terminals have seriously impeded the normal flow of our freight car fleets.

Southern Pacific is taking active steps to improve equipment supply. Our "TOPS" computer-communications program helps us get much better utilization of cars. We took delivery of 431 freight train cars and 51 diesel locomotives, costing $28.5 million, in the first quarter, and have over 3,200 more cars and 36 more locomotives, costing $87.5 million, on order, many for second quarter delivery.

While Southern Pacific is building its share of cars, it cannot also supply the requirements of the financially distressed members of the railroad industry. The country badly needs some of the changes in transportation policy and regulation which are the subject of bills now before Congress.

We did show railroad operating revenue gains in the first quarter from increased movement of petroleum products, acids and chemicals, ores and concentrates, motor vehicles and parts, and primary metal products. In addition to the decline in forest products, perishables and sugar beets dipped, due to bad weather.

Railroad operating expenses increased even more, however, because of higher wages, health and welfare benefits, maintenance and fuel costs, property taxes, and, significantly, railroad retirement taxes.

The cost increases prompted the industry to file a petition on April 20 with the Interstate Commerce Commission for a 5 per cent freight rate increase, with some specified exceptions. The railroads are urging the Commission to take prompt action because of the pressing need for added revenue.

First-quarter results from other subsidiaries were mixed. Trucking and pipeline revenue gains exceeded cost increases. Property sales improved income from land and natural resources. Start-up costs for our new Southern Pacific Communications Company and loss of forest products traffic by Evergreen Freight Car Corporation because of the freight car shortage cut income from miscellaneous operations.

Interest expense was up in the first quarter, because of our new equipment financing programs, while interest income was down because we had less funds to invest. Other non-operating income declined as a result of a greater loss by jointly controlled affiliated companies this year and because of a non-recurring gain from the sale of Western Pacific stock in 1972.

The unfortunate series of explosions April 28 in a group of government rail cars carrying munitions in our big freight yard at Roseville, California, caused an estimated $5 to $6 million damage to rail equipment and facilities. Train service was quickly resumed and the yard will be restored and in normal service by the time you receive this. Most injuries reported were very minor, and there were no fatalities. While causes for the explosions have yet to be determined and investigations are continuing, Southern Pacific's insurance coverage will limit its financial loss or liability to $2.5 million.

Besides getting our railroad back to normal as fast as possible, we have been helping our Roseville neighbors do the same with their homes and businesses which sustained blast damage. We opened a special claims office in Roseville, even before the explosions had ended, to provide emergency funds for their immediate needs.

If the general business activity of the nation continues strong and if we are able to secure the necessary rate relief to offset some of our rising costs, Southern Pacific should have a good year in 1973.

These are times of rapid change, and we hope the added frequency of our communications with the company's owners, through this new quarterly report, will be both interesting and helpful.

/s/ [Illegible]
President and Chief
Executive Officer

San Francisco, May 8, 1973

SOUTHERN PACIFIC COMPANY AND SUBSIDIARIES

CONSOLIDATED NET INCOME

	(Thousands of Dollars*) First Quarter 1973	First Quarter 1972	(Decrease) Increase
OPERATING REVENUES			
Railway	$322,617	$305,512	$17,105
Trucking	25,056	22,786	2,270
Pipeline	10,944	10,077	867
Land and natural resources	2,938	1,211	1,727
Miscellaneous operations	1,376	2,311	(935)
Total	362,931	341,897	21,034
OPERATING EXPENSES			
Railway	295,465	274,752	20,713
Trucking	24,380	22,269	2,111
Pipeline	6,253	5,482	771
Land and natural resources	2,763	1,755	1,008
Miscellaneous operations	1,679	1,263	416
Total	330,540	305,521	25,019
INCOME FROM OPERATIONS	32,391	36,376	(3,985)

* Except per share amounts.

OTHER INCOME			
Miscellaneous rentals	3,173	3,099	74
Gain on sales of property	804	1,645	(841)
Interest	2,378	2,614	(236)
Other non-operating items	(1,362)	486	(1,848)
Total	4,993	7,844	(2,851)
INTEREST EXPENSE	11,379	10,635	744
INCOME BEFORE FEDERAL INCOME TAXES	26,005	33,585	(7,580)
FEDERAL INCOME TAXES			
Current—before investment credit	4,196	7,201	(3,005)
Less investment credit	1,762	2,915	(1,153)
Current—net of investment credit	2,434	4,286	(1,852)
Deferred	9,226	9,434	(208)
Total	11,660	13,720	(2,060)
Income before minority interests	14,345	19,865	(5,520)
Less minority interests	245	231	14
NET INCOME	$ 14,100	$ 19,634	$(5,534)
NET INCOME PER SHARE—Based on Average number of shares outstanding	$ .53	$ .74	$ (.21)

From Pacific Coast Shipping Points, 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To Miami, Florida	$ 2.07	$1552.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To St. Louis, Mo.	.50	375.00	
			To Miami 60,000#	.83	498.00	
			To Miami 15,000#	.60	90.00	
		$1552.50			$2260.50	$ 708.00
To Ft. Worth-Dallas, Tex.	$ 1.79	$1342.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Coffeeville, Ks.	.59	442.50	
			To Ft. W.-Dallas 50000#	.44	220.00	
			To Ft. W.-Dallas 15000#	.30	45.00	
		$1342.50			$2005.00	$ 662.50
To Chicago, Illinois	$ 1.81	$1357.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Chicago, Ill.	.50	$ 375.00	
		$1357.50			$1672.50	$ 315.00
To New York, N. Y. (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Chicago, Ill. 75000#	.48	360.00	
			To New York 60000#	1.00	600.00	
			To New York 15000#	.63	94.50	
		$1432.50			$2452.00	$1017.50

From Pacific Coast Shipping Points 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To New York, N. Y. (Ply)	$ 2.07	$1552.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To Chicago, Ill. 75000#	.48	360.00	
			To New York 60000#	1.00	600.00	
			To New York 15000#	.63	94.50	
		$1552.50			$2452.00	$ 899.50
To San Antonio, Texas	$ 1.79	$1342.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To Coffeeville, Ks.	.59	442.50	
			To San Antonio 50000#	.76	380.00	
			To San Antonio 15000#	.47	70.50	
		$1342.50			$2290.50	$ 948.00
To St. Louis, Mo.	$ 1.79	$1342.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To St. Louis, Mo.	.68	510.00	
		$1342.50			$1907.50	$ 565.00
To: Toledo, Ohio (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To Chicago, Ill. 75000#	.48	360.00	
			To Toledo, O. 60000#	.40	240.00	
			To Toledo, O. 15000#	.22	33.00	
		$1432.50			$1930.50	$ 498.00
To Toledo Ohio (Ply)	$201.00	$1507.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To Chicago 75000#	.48	360.00	
			To Toledo, O. 60000#	.44	264.00	
			To Toledo, O. 15000#	.24	36.00	
		$1507.50			$1957.50	$ 450.00

From North Pacific Coast Shipping Points 70000 # Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
From Portland, Oregon	.63	$ 441.00	To Roseville, Cal.	.59	$ 413.00	
To San Francisco, Calif.			To San Francisco	.36	252.00	
		$ 441.00			$ 665.00	$ 224.00
From Portland, Oregon	.87	$ 609.00	To Roseville, Cal.	.59	$ 413.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	$ 406.00	
		$ 609.00			$ 819.00	$ 210.00
From Seattle, Washington	.87	$ 609.00	To Roseville, Cal.	.83	$ 581.00	
To San Francisco, Calif.			To San Francisco, Cal.	.36	252.00	
		$ 609.00			$ 833.00	$ 224.00
From Seattle, Washington	1.04	$ 728.00	To Roseville, Cal.	.83	$ 581.00	
To Los Angeles, Calif.			To Los Angeles, Cal.	.58	406.00	
		$ 728.00			$ 987.00	$ 259.00

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

Civil No. 73-386

[Filed June 6, 1973, U.S. District Court, District of Oregon. Robert M. Christ, Clerk. By C. Mundorff, Deputy]

ORDER

On May 8, 1973, the I.C.C. issued Car Service Order No. 1134, pursuant to the emergency power granted it by 49 U.S.C. § 1(15). The order became effective one week later and was issued without notice or hearing. It found that there was an acute shortage of boxcars which was attributable at least in part to the practice of shippers of lumber products of delaying carloads of lumber in transit while arranging for final disposition. The order required carriers to charge the sum of the freight rates from the point of origin to the point of holding and from the point of holding to ultimate destination, rather than the through route. The effect is to increase the overall freight charge by up to 40% in some cases.

Various shippers of lumber and plywood who are affected by the order filed the complaint, seeking an injunction against the enforcement of the order. A three-judge court has been designated pursuant to 28 U.S.C. §§ 2325 and 2284. However, pending the hearing before the three-judge court on the request for a temporary injunction, plaintiffs have petitioned this Court as a single judge to grant a temporary restraining order

against the enforcement of the Car Service Order pursuant to Subsection (3) of § 2284.

The main thrust of plaintiff's argument is that the order in question is not properly a Car Service Order as defined in 49 U.S.C. § 1(10), such as to justify the emergency procedure in Subsection (15) of the same statute. Instead, they say, it is an order affecting a tariff which can only be accomplished through the statutory procedure requiring a hearing. See, e.g., 49 U.S.C. § 15(3). This legal question is a substantial one. The Commission is no doubt correct in pointing out that the order does affect the use to which boxcars are put, mainly by penalizing their use for storing lumber rather than transporting it. Nevertheless, plaintiff's argument is very persuasive. The order obviously changes the method of calculating the tariff on such shipments. The particular problem in question is one that has traditionally been dealt with by demurrage charges, penalties and the like, imposed as part of the tariff. See, e.g., *Turner, D. & L. Lumber Co.* v. *Chicago, M. & St. P. R. Co.*, 271 U.S. 259 (1926).

The Court must weight other factors. The I.C.C. has pointed out that it acted to protect the public interest which is being jeopardized by the boxcar shortage. The public at large is one of the intended beneficiaries of the order. Should a temporary restraining order against the enforcement of the Car Service Order impede efforts to speed up transportation, there is no way this Court could adequately safeguard that interest within the confines of a temporary restraining order. On the other hand, the plaintiff shippers are harmed if the Car Service Order is allowed to remain in effect pending disposition on the merits. They represented that approximately 8% to 10% of their lumber shipments would be subject to the order, and that freight costs account for 50% of their overall cost. However, as far as the Court can determine, there is no reason why plaintiff shippers would not be entitled to refunds of overcharges should the order ultimately be struck down. Of course, subsequent refunds are not likely to undo all of the harm to shippers, for a variety of business reasons. Nevertheless, the Court concludes that there is a greater likelihood of irreversible harm by granting a temporary restraining order than by denying one. On balance, this consideration outweighs other factors. The statute itself places emphasis upon irreversible harm, 28 U.S.C. § 2284(3). The legal question is a close one, and must ultimately be decided by a three-judge panel upon the motion for a preliminary injunction.

Accordingly, it is

ORDERED that the motion for a temporary restraining order be DENIED, and it is further

ORDERED that the motion of Interstate Commerce Commission to intervene is GRANTED.

DATED this 6th day of June 1973.

/s/ Otto L. Skopil, Jr.
OTTO L. SKOPIL, JR.
United States District Judge

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, DEFENDANTS

JOINT ANSWER OF THE UNITED STATES OF AMERICA AND THE INTERSTATE COMMERCE COMMISSION

Defendants, the United States of America and the Interstate Commerce Commission, answer the complaint as follows:

I.

As to paragraph I, admit that the plaintiffs are engaged in the lumber wholesale business. The remainder of the paragraph, however, being argumentative in nature calls for no reply.

II.

Admit the allegations of paragraphs II and III.

III.

Deny the allegations of paragraphs IV and V.

IV.

Except as expressly admitted, each allegation of the complaint is denied.

V.

In further answer to the allegations of the complaint, defendants deny that the actions of the defendant, Interstate Commerce Commission, challenged in the complaint are erroneous for the reasons specified or for any other reason whatsoever, and further aver that the order of the Commission under attack is valid and lawful in all respects.

WHEREFORE, defendants, the United States of America and the Interstate Commerce Commission, pray that the relief sought be denied and the complaint be dismissed.

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Department of Justice
Washington, D.C. 20530

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Assistant Attorney General

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CHARLES H. WHITE, JR.
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Interstate Commerce
Commission
Washington, D.C. 20423

Attorneys for the Interstate Commerce Commission

CERTIFICATE OF SERVICE

I hereby certify that on this, the 10th day of August, 1973, I served copies of the foregoing Joint Answer on counsel for all parties of record by first-class airmail, postage prepaid.

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION,
DEFENDANT-INTERVENOR

Civil No. 73-386

STIPULATION OF FACTS

It is hereby stipulated between the parties as follows:

1. This Court has jurisdiction of the parties by reason of service of process and their appearance in this action, and jurisdiction of the subject matter pursuant to 28 USC 2321-2325.

2. Plaintiffs are corporations organized and existing under the laws of the State of Oregon and are all en-

gaged in the wholesale lumber business. In their business they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and to the Plaintiffs as well as to all other persons engaged in similar lines of business.

3. On May 8, 1973, the Interstate Commerce Commission, basing its action on the provisions of 49 USC 1(15), without notice, hearing or an opportunity to be heard, issued Service Order No. 1134. A copy of the Order is attached to this Stipulation.

4. Service Order No. 1134 applies only to the transportation of lumber and plywood by railroads and provides that in the event car load shipments of lumber or plywood are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate destination. Such shipment would be subject to the sum of the local rates which are usually substantially greater in amount. A fair and representative group of examples of the effect of the Order on the cost of transportation of lumber and plywood are shown in the schedules attached hereto, which is the same schedule which was attached to the application for a temporary restraining order.

5. If called as a witness, A. M. Cheatham, Director of Traffic of Oregon Pacific Industries, Inc., one of the Plaintiffs in this action, would testify in accordance with the sworn statement attached hereto, and the parties stipulate that his statement may be considered by this Court in lieu of his oral testimony.

6. The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years and the Interstate Commerce Commission has

issued hundreds of Service Orders under 49 USC 1(15) in an attempt to alleviate the problem caused by boxcar shortages.

7. The parties stipulate that the Interstate Commerce Commission has never in the past issued an order pursuant to the claimed authority of 49 USC 1(15), which imposed the sanctions contained in Service Order No. 1134, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff.

8. Attached to this Stipulation is a copy of a letter written by the Chairman of the Interstate Commerce Commission, dated February 20, 1969, to the Honorable Robert Packwood, U.S. Senate, relating to Service Order No. 1020.

9. Inflation is currently a matter of critical importance in our economy. The Cost of Living Council, in addition to enforcing direct wage and price controls, develops policies to encourage efficient distribution of products as a means to combat inflation. The CLC has recognized that "the long-established lumber marketing practice of shipping unconsigned lumber for sale in route" has resulted in tying up large numbers of box cars.

10. Attached to this Stipulation is a copy of a letter written by the Deputy Director of the Cost of Living Council dated May 3, 1973, to the Chairman of the Interstate Commerce Commission; and a copy of a letter written by the Chairman of the Interstate Commerce Commission dated May 14, 1973, to the Deputy Director of the Cost of Living Council. Both letters were submitted to the Court at the hearing for a temporary restraining order.

11. If called as a witness, Thomas J. Byrne, Chief of the Section of Railroads of the Interstate Commerce Commission, would testify in accordance with the sworn state-

ment attached hereto, and the parties stipulate that his statement may be considered by the Court in lieu of his oral testimony.

/s/ Seymour L. Coblens
SEYMOUR L. COBLENS
Attorney for Plaintiffs

Attorney for Defendant
and Defendant-Intervenor

EXHIBIT ¶ A"

Service Date
May 8, 1973

FR

TITLE 49—TRANSPORTATION
CHAPTER X—INTERSTATE COMMERCE COMMISSION
SUBCHAPTER A—GENERAL RULES AND REGULATIONS

PART 1033—CAR SERVICE

SERVICE ORDER NO. 1134
LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING

At a Session of the Interstate Commerce Commission, Division 3, held in Washington, D.C., on the 3rd day of May 1973.

It appearing, That an acute shortage of boxcars and other freight cars suitable for transporting lumber and plywood exists throughout the country; that certain carriers are unable to furnish adequate supplies of these types of freight cars to shippers located on their lines; that these shortages of freight cars are impeding the movement of many commodities; that many freight cars are held by shippers for excessive periods awaiting loading, unloading, or disposition instructions; that carloads of lumber and plywood are being held for excessive periods awaiting instructions for diversion, reconsignment of other disposition orders; that such practices immobilize large numbers of freight cars needed by shippers for the transportation of other freight; and that the existing demurrage and detention rules, regulations, and practices of the railroads are ineffective to control such use of freight cars. It is the opinion of the Commission that an emergency exists requiring immediate action to promote car service in the interest of the public and the commerce of the people. Accordingly, the Commission finds that notice and public procedure are impracticable and contrary to the public interest, and that good cause exists for making this order effective upon less than thirty days' notice.

It is ordered, That:

§ 1033.1134 *LUMBER AND PLYWOOD—RESTRICTIONS ON RECONSIGNING*

(a) Each common carrier by railroad subject to the Interstate Commerce Act shall observe, enforce, and obey the following rules, regulations, and practices with respect to its car service:

(1) *Application*:

(i) The provisions of this order shall apply to intrastate, interstate, and foreign commerce.

(ii) *Definition of Lumber and Plywood*

The term "lumber and plywood" as used in this order means lumber, veneer of forest products as listed in items 57580 to 58450 of Uniform Freight Classification No. 11, I.C.C. 7, or as listed in items 57580 to 58450 of Consolidated Freight Classification No. 23, I.C.C. No. 2, each issued by J. D. Sherson, supplements thereto, or re-issues thereof.

(2) *Holding of Cars for Diversion, Reconsignment, or Disposition Orders Restricted*:

Carload shipments of lumber or plywood held in cars in excess of five days (120 hours), exclusive of Saturdays, Sundays, and holiday listed in Item 25 of General Car Demurrage Tariff 4-J, I.C.C. H-59, issued by B. B. Maurer, supplements thereto, or re-issues thereof, after the first seven a.m. (7:00 a.m.) after notice of arrival of the car at billed destination, is sent or given and subsequently forwarded to another destination or delivered to a newly designated consignee upon instructions of the consignee, consigner or owner, will be subject to the full local or joint (not proportional, reshipping, or transhipping) tariff rate from origin point to hold point in effect on date of shipment plus the full local or joint (not proportional, reshipping, or transshipping) tariff rate from the reforwarding point in effect on the date reforwarding instructions are given to carrier, plus all

other applicable charges previously or subsequently accruing. (See exception.)

(3) *Exception: Cars at Hold Points on May 15, 1973.*

A notice, giving car number and hold point, shall be sent on May 15, 1973, to each shipper, consignee, or other qualified owner of each car of lumber or plywood held awaiting instructions for diversion, reconsignment, or reforwarding on that date, stating that the car will be subject to the bases of charges provided in this order unless diversion, reconsignment, or reforwarding instructions are given to the carrier within five days (120 hours) exclusive of Saturdays, Sundays, and holidays of the effective date of this order. Such notice shall be used in lieu of the arrival notice described in part (2) herein, in computing time on cars at hold points on May 15, 1973.

(b) *Rules and regulations suspended.*

The operation of all rules and regulations, including rates, rules, and free-time periods granted by authority of Part 1, Section 22 of the Interstate Commerce Act, insofar as they conflict with the provisions of this order, is hereby suspended.

(c) *Effective date.* This order shall become effective at 11:59 p.m., May 15, 1973.

(d) *Expiration date.* This order shall expire at 11:59 p.m. July 31, 1973, unless otherwise modified, changed, or suspended by order of this Commission.

(Secs. 1, 12, 15, and 17(2), 24 Stat. 379, 383, 384, as amended: 49 U.S.C. 1, 12, 15, and 17(2). Interprets or applies Secs. 1(10-17), 15(4), and 17(2), 40 Stat. 101, as amended, 54 Stat. 911; 49 U.S.C. 1(10-17), 15 (4), and 17(2).)

It is further ordered, That a copy of this order and direction shall be served upon the Association of American Railroads, Car Service Division, as agent of the railroads subscribing to the car service and car hire agreement under the terms of that agreement, and upon the American Short Line Railroad Association; and that no-

tice of this order be given to the general public by depositing a copy in the Office of the Secretary of the Commission at Washington, D.C., and by filing it with the Director, Office of the Federal Register.

By the Commission, Division. 3.

ROBERT L. OSWALD
Secretary

From Pacific Coast Shipping Points, 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To Miami, Florida	$ 2.07	$1552.50	To Marshalltown, Iowa	$1.73	$1297.50	
			To St. Louis, Mo.	.50	375.00	
			To Miami 60,000#	.83	498.00	
			To Miami 15,000#	.60	90.00	
		$1552.50			$2260.50	$ 708.00
To Ft. Worth-Dallas, Tex.	$ 1.79	$1342.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Coffeeville, Ks.	.59	442.50	
			To Ft. W.-Dallas 50000#	.44	220.00	
			To Ft. W.-Dallas 15000#	.30	45.00	
		$1342.50			$2005.00	$ 662.50
To Chicago, Illinois	$ 1.81	$1357.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Chicago, Ill.	.50	$ 375.00	
		$1357.50			$1672.50	$ 315.00
To New York, N. Y. (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa	1.73	$1297.50	
			To Chicago, Ill. 75000#	.48	360.00	
			To New York 60000#	1.00	600.00	
			To New York 15000#	.63	94.50	
		$1432.50			$2452.00	$1017.50

From Pacific Coast Shipping Points 75000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
To New York, N. Y. (Ply)	$ 2.07	$1552.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To New York	60000#	1.00	600.00	
			To New York	15000#	.63	94.50	
		$1552.50				$2452.00	$ 899.50
To San Antonio, Texas	$ 1.79	$1342.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Coffeeville, Ks.		.59	442.50	
			To San Antonio	50000#	.76	380.00	
			To San Antonio	15000#	.47	70.50	
		$1342.50				$2290.50	$ 948.00
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			To St. Louis, Mo.		.68	510.00	
		$1342.50				$1907.50	$ 565.00
To: Toledo, Ohio (Lbr)	$ 1.91	$1432.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago, Ill.	75000#	.48	360.00	
			To Toledo, O.	60000#	.40	240.00	
			To Toledo, O.	15000#	.22	33.00	
		$1432.50				$1930.50	$ 498.00
To Toledo Ohio (Ply)	$201.00	$1507.50	To Marshalltown, Iowa		$1.73	$1297.50	
			To Chicago	75000#	.48	360.00	
			To Toledo, O.	60000#	.44	264.00	
			To Toledo, O.	15000#	.24	36.00	
		$1507.50				$1957.50	$ 450.00

From North Pacific Coast Shipping Points 70000# Minimum Carload	Through Rate	Freight Charges	Freight Charges Based On Local Rates			Resultant Penalty
From Portland, Oregon	.63	$ 441.00	To Roseville, Cal.		.59	$ 413.00	
To San Francisco, Calif.			To San Francisco		.36	252.00	
		$ 441.00				$ 665.00	$ 224.00
From Portland, Oregon	.87	$ 609.00	To Roseville, Cal.		.59	$ 413.00	
To Los Angeles, Calif.			To Los Angeles, Cal.		.58	$ 406.00	
		$ 609.00				$ 819.00	$ 210.00
From Seattle, Washington	.87	$ 609.00	To Roseville, Cal.		.83	$ 581.00	
To San Francisco, Calif.			To San Francisco, Cal.		.36	252.00	
		$ 609.00				$ 833.00	$ 224.00
From Seattle, Washington	1.04	$ 728.00	To Roseville, Cal.		.83	$ 581.00	
To Los Angeles, Calif.			To Los Angeles, Cal.		.58	406.00	
		$ 728.00				$ 987.00	$ 259.00

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

vs.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION,
INTERVENOR-DEFENDANT

AFFIDAVIT

STATE OF OREGON)
) ss:
COUNTY OF MULTNOMAH)

I, Alex M. Cheatham, being duly sworn, depose and say:

I

I am the Director of Traffic for Oregon Pacific Industries, Inc., one of the Plaintiffs in the above entitled action and have been so employed by Oregon Pacific Industries, Inc., for over eight (8) years in that capacity. I have been connected with the transportation business, particularly with reference to lumber and plywood for approximately thirty-three (33) years and I

am fully familiar with the requirements of lumber transportation and the economic and marketing practices of the lumber industries in that connection.

II

Service Order No. 1134 limits the time a carload of lumber or plywood can be held for orders at any point in the United States to 120 hours (5 working days) and still move forward to a final destination on the published through rate; cars held beyond the 120-hour maximum will then be subject to local rates from origin to hold point and local rates from hold point to final destination. The Interstate Commerce Commission has long indicated that the lumber and plywood industry as a whole is the prime offender in delay of freight cars and is thereby one of the major contributors to car shortages throughout the United States. In this statement, I am assuming that the railroads ultimately have as an objective the suspension of all hold points in the United States, and therefore, I am approaching the matter in its total context. I am prepared to refute the argument that the present method of utilization of railroad equipment is wasteful and inefficient, and to show that the elimination of hold points and the imposition of Service Order No. 1134 would put great pressure on our supplying mills to carry much heavier inventories and create great problems for the railroads to provide necessary equipment to service the forest products industry.

III

PRESENT CAUSES OF EQUIPMENT SHORTAGE

Before going into the subject of possible suspension of hold points and imposition of Service Order No. 1134 conditions, it may be well to pinpoint the reasons for current car shortages as I see them:

(1) Inability of railroads to forecast their needs accurately;

(2) The financial inability of many railroads to purchase adequate equipment to service their on-line customers;

(3) A booming economy in which all industries, not just forest products, are putting great pressure upon railroad facilities. The export grain movement in particular has contributed greatly to the current car shortage—stated recently by B. F. Biaggini, President and Chief Executive Officer of the Southern Pacific Transportation Company; and

(4) Inefficiencies within the railroads themselves, leading to a loss of car time in switching, diverting, reconsigning and pulling out empty cars from industry. Most of the railroads have been negligent in forecasting the very rapid shifts in demand for railroad equipment to move lumber. In the past few years, there have been dramatic shifts from loose loaded to packaged lumber in rail car shipments. The result of this market development has meant a very substantial increase in the need for bulkhead flat cars and wide door box cars, suitable for shipment of packaged lumber. This trend was evident as long ago as ten years and the present lack of equipment of this kind can only be attributed to the inability of the railroads to forecast needs in this regard. Within the next five years, it is estimated that as much as 80%-90% of all lumber will move either in a packaged or unitized form and the preparation for an increase in shipments of this magnitude must begin now. However, it is evident the railroads are doing little, if anything, to meet these future needs. One of the problems that contributes substantially to the current car shortage is inefficiency within the railroads themselves. We have many specific examples from our customers of loss of car time in switching, diverting and reconsigning cars. I feel that an aggressive program by the railroads themselves to tighten up their inefficiencies would contribute a great deal to the more efficient use of their equipment.

IV

WHAT IS A WHOLESALER?

In the lumber industry the wholesaler plays two very different and important roles in the marketing of lumber and plywood. First he is the sales manager for producing mills who would find it financially impossible to sell their products to all marketing areas of the United States and second, he is the purchasing agent for retail lumber yards who would find it financially impossible to canvass all producing lumber mills to fill their requirements. It is estimated that 75% of all lumber and plywood produced is sold through the wholesale arm of the lumber industry.

V

WHY ARE RECONSIGNMENT PRIVILEGES AND HOLD POINTS IMPORTANT TO LUMBER MARKETING?

Hold points have been a traditional part of lumber marketing for decades, at least 33 years from my own personal experience, and as a result, certain marketing practices have been developed surrounding this service. During the 1950's the circuitous routings provided by most of the western and midwestern railroads, together with free 15-day holds, led to flagrant abuses of reconsignment privileges. In the early 1960's, circuitous routings were abolished and, together with higher demurrage rates and improved marketing procedures by wholesalers, most serious abuses were eliminated. The character of a wholesaler can be broken down generally into two categories, i.e.:

(1) Firm orders received from customers and placed simultaneously with supplying mills (mill shipments); and

(2) Lumber purchased for his own account and sold at a later date (known generally throughout the industry as a "transit").

Wholesalers receive many firm orders from their customers where final destinations are not given until the lumber has been produced and shipped to hold points. Many of our customers have more than one yard or plant to which they wish lumber shipped, but will defer giving final destination until after the lumber has been shipped. In addition, most wholesalers anticipate a considerable portion of their requirements and will order lumber for shipment to reconsignment points to have stock available for quick sale and delivery to final destination. The flexibility allowed by use of hold points enables the wholesaler to act as a buffer between mill and customer, smoothing out the inventories of both parties and performing an important marketing function. In addition, it should be emphasized that railroad equipment is best utilized when mills can ship their lumber to hold points rather than waiting until final destinations are secured on each shipment. The shortage of railroad equipment tends to be sporadic and the use of hold points allows available equipment to be used when lumber is ready for shipment, not just when lumber is needed by a customer.

VI

IMPACT UPON MILLS

Let us now examine the impact upon the mills and railroads of the elimination of hold points and the imposition of Service Order No. 1134 upon them.

Assuming the railroads were effective in eventually eliminating hold points, and assuming Service Order No. 1134 goes into effect, shipments other than to firm destinations would be too hazardous and would be discontinued almost immediately. With all orders having to be held at the mill level awaiting final destination, the increase in mill inventories would be enormous. Within the parties associated with Oregon Pacific Industries, Inc., in this current litigation, if we assume that the approximate volume of our associates and ourselves is 165,000 carloads of lumber and plywood annually, and that the approximate volume of these associates to reconsignment

points is ⅓rd of the total shipments, which includes shipments incurring no delay or demurrage, this would mean approximately 55,000 carloads or 2.5 billion board feet of additional inventory would have to be carried by our mills on an annual basis to supply us. If we take into consideration that our associates are a small part of the total North American wholesale lumber industry, it can easily be seen that the increase in mill inventories to service present rail markets would be substantial. This shift would create hardships for many mills, particularly those with limited financial sources and yard space. It would force closure of many smaller producers and in turn place an unbearable burden upon larger producers.

VII

IMPACT UPON RAILROADS:

As I have already mentioned, the present use of hold points enables the wholesaler to make shipments not only when lumber is available but when rail equipment is also available. If all orders from mills had to await confirmation of final destination prior to shipment, the pressure upon railroads to provide for more precise shipping schedules would be greatly increased. I suggest, therefore, that the flexibility of hold points insures maximum use of available equipment, particularly during periods of car shortages.

VIII

SUMMARY:

(1) I believe the railroads should deal with the basic causes of current car shortages and not eliminate what we consider an essential service in the marketing of forest products.

(2) The wholesalers will cooperate fully in positive efforts to relieve the car shortage, i.e.: use of most direct routings to final destinations and other methods to increase car utilization.

(3) Suspension of hold points, or the imposition of a 5-day limitation on business transactions to qualify for through rate provisions, would defeat the purpose for which it was intended.

(4) Forcing wholesalers to eliminate "transit" orders from their established business practice of marketing lumber and plywood would impose serious financial and physical handling problems for many of the mills with which we do business.

(5) The present use of hold points enables mills and wholesalers to make shipments if necessary, prior to final sale or destination being received, and insures maximum use of available railroad equipment during periods of car shortages.

(6) The Interstate Commerce Commission has the means to require movement of empty equipment back to ownership lines, but with few exceptions has not at this time done so.

(7) The breaking of the through rate provisions as set forth in Service Order No. 1134 would seriously impair the ability of wholesale members of the lumber industry to exist as a marketing arm of the total forest products industry.

/s/ Alex M. Cheatham
ALEX M. CHEATHAM

Subscribed and sworn to before me this 12th day of June, 1973.

/s/ Susan E. Reid
SUSAN E. REID
Notary Public for Oregon

My Commission expires: 12/28/73.

INTERSTATE COMMERCE COMMISSION

Washington, D.C. 20423

OFFICE OF THE CHAIRMAN

February 20, 1969

Honorable Robert W. Packwood
United States Senate
Washington, D.C. 20510

Dear Senator Packwood:

This is in reply to your letter of February 13, 1969, concerning the boxcar shortage in the Northwest and the adverse effect which it is having on the lumber industry in that area.

We in the Commission are fully aware of the acute shortage of 40-foot (wide door) and 50-foot boxcars. Unfortunately these shortages are not confined to the Northwest, but strongly prevail in all sections of the country. A number of other Congressional inquiries have been received regarding this matter.

As advised, the Commission issued Service Order No. 1020 to become effective February 10. I am enclosing copies of the order, which requires the withdrawal from distribution of 40-foot (wide door) and 50-foot boxcars and directs their return to owners, empty, except if loading is available to stations on or via the owner, or to any destination which is closer to the owner than the point where the cars are loaded. The purpose of the order, of course, is to make available to the owning carriers the type of equipment which is owned by them to meet the needs of shippers whom they serve. In view of the fact that the shortages of the above-mentioned cars are widespread, equity dictates that, in all fairness, the order must apply to cars of all ownerships.

I assure you that our field staff is constantly checking for any misuse of equipment. Excessive holding of cars is not tolerated, although it is sometimes necessary for

military installations to hold certified empty boxcars for loading explosives.

The Commission is strenuously endeavoring to alleviate existing car shortages and to promote maximum utilization of available equipment.

Sincerely,

/s/ Virginia Mae Brown
VIRGINIA MAE BROWN
Chairman

Enclosures

May 14, 1973

Mr. James W. McLane
Deputy Director
Cost of Living Council
Economic Stablization Program
Washington, D. C. 20508

Dear Mr. McLane:

This is in reply to your letter dated May 3, 1973, expressing concern regarding the effect the nation's freight car supply is having on the movement of food and lumber products by railroad.

The following information is submitted regarding the events leading up to the present freight car dilemma. Prior to the announcement of the Russian grain sale, our nation's carriers were reporting a surplus of both boxcars and covered hopper cars, the types used in the transportation of grain, as well as lumber and some food products. Beginning in early October 1972 surpluses began to disappear and shortages were being reported. These shortages grew progressively from week to week until now the average daily shortages of boxcars exceed 13,000 and covered hopper shortages exceed 14,000.

The Interstate Commerce Commission has taken many actions to improve utilization and thereby alleviate shortages. These actions have been directed against both the carriers and the shippers. Service Order No. 1112 required the carriers to give expeditious handling to all traffic and, incidentally, was issued in early October in an effort to forestall the acceleration of shortages as long as possible. We have also issued orders reducing the free time at ports and increasing demurrage on domestic traffic, as well as other orders penalizing shippers for excessively detaining equipment.

It is agreed that there is an urgent need at this time for increased railroad car capacity to move grain. In fact, by our Service Order No. 1117 we authorized the substitution of open hopper cars in lieu of covered hoppers for transporting grain at the same rates applicable

to covered hoppers. This action has placed about 15,000 open hopper cars in the grain trade and has accomplished much in giving many shippers the means of getting their grain to commercial markets or to ports.

It is true that the covered hopper car is the most desirable type of equipment for transporting grain. However, in times of shortages as we are presently experiencing, shippers are happy to get boxcars or, as previously mentioned, in some cases, open hopper cars.

The purpose of our incentive per diem order was basically to encourage the acquirement of plain boxcars, generally referred to as the "work horse of the car fleet." The incentive per diem was imposed only on plain boxcars, the ownership of which has consistently deteriorated over the years. For example, as of January 1, 1963, our nation's carriers owned 578,834 plain boxcars. This number has been reduced to the present ownership of 337,671 cars. In comparison the ownership of covered hopper cars on January 1, 1963, was 69,106 while as of April 15, 1973, the ownership had increased to 145,358. This clearly illustrates the carriers' policy in increasing the ownership of covered hopper cars while allowing their boxcar fleets to deteriorate. Consequently, our action in Ex Parte No. 252 appears logical and necessary to protect shippers of commodities requiring boxcars, including grain, lumber, and food products.

The Union Pacific Railroad has filed a petition with the Commission requesting that it be allowed to use the funds held in escrow to acquire covered hopper cars instead of boxcars. This is presently under consideration and a hearing has been set for June 7 when this and other suggested revisions in the order will be considered.

The use of circuitous routing in the shipping of lumber has been of much concern to this Commission, and while it is recognized that such practice is a long established lumber marketing one for selling lumber en route, it definitely does contribute to poor car utilization. It is pointed out, however, that the existing tariffs permit the shipper to use such routings and as the Interstate Commerce Act provides that the shipper has the right to specify the routing, it is questionable whether we could

by service order deprive the shipper of such right. The Commission has issued orders preventing internal circuitous routing by carriers in order to delay transit time on shipments. We have found little necessity to issue orders of this nature in the past year or two.

On May 8 the Commission issued Service Order No. 1134, the provisions of which restrict the holding of lumber and pulpwood at hold points in excess of five days without being penalized in the application of the through rate. I am enclosing a copy of this order.

I assure you, however, that we are continuing to closely monitor the handling of all commodities in order that necessary actions may be taken to promote maximum utilizaiton of the available car fleet.

Sincerely yours,

/s/ George M. Stafford
GEORGE M. STAFFORD
Chairman

ECONOMIC STABILIZATION PROGRAM
COST OF LIVING COUNCIL

Washington, D.C. 20508

May 3, 1973

[EMBLEM]

Office of
the Deputy Director

Honorable George M. Stafford
Chairman
Interstate Commerce Commission
12th Street and Constitution Avenue, N.W.
Washington, D. C. 20423

Dear Chairman Stafford:

As you know, inflation is one of the most serious problems facing our country at this time. The Cost of Living Council has been given the responsibility to develop a coordinated effort by the Government to combat inflation through the application of direct wage and price controls, actions to enhance supplies of scarce commodities, and policies to encourage greater efficiency in the production and distribution of agricultural and industrial products.

As part of this responsibility, the Council has been examining the policies and procedures of transportation modes that affect wholesale and retail prices, particularly the prices of food and lumber products. In the course of our investigations, we have learned of two situations that tend to inhibit efficiency in the movement of food and lumber products by railroads. My purpose in writing this letter is to request that the Interstate Commerce Commission investigate these situations and take appropriate actions to modify them.

1. To ease prices of grain and livestock feed, the Administration has taken actions to increase the supplies of wheat and corn entering the market. In particular, 110 million bushels of CCC-owned wheat and corn stocks were

sold during March. There is an urgent need at this time for increased railroad car capacity to move this grain to commercial markets, in addition to continuing the movement of grain to ports for overseas shipment. This need could best be met through the addition of covered hoppers to the railroad fleet.

Current ICC regulations prohibit the use of incentive per diem funds to purchase special purpose cars rather than general purpose boxcars. Inasmuch as there will be a continuing and probably increasing need for rapid grain movement in the years ahead, it is advisable in our judgment that incentive per diem fund policies be altered to permit the purchase of special purpose cars such as covered hoppers. I am informed that a number of railroads, including the Union Pacific and the Penn Central, and the National Industrial Traffic League have also recommended this revision in ICC regulations.

I would appreciate it if your staff would consider this recommendation carefully and prepare a report to the Cost of Living Council on the feasibility of effecting such a modified policy.

2. The second situation with which we are concerned is the excessive circuity of routes utilized by shippers in moving lumber from the West Coast. I recognize that this situation stems from the long-established lumber marketing practice of shipping unconsigned lumber for sale in route. However, the obvious result of this practice is to tie up large numbers of boxcars for extended periods and to inhibit rapid turnaround of rail equipment.

I would like to request that the Commission initiate an immediate staff level investigation into the use of circuitous routing in domestic lumber traffic and determine prompt actions that can be taken to increase efficiency in the utilization of freight cars for the movement of lumber products.

I appreciate your cooperation and assistance in these matters. I believe that your prompt action can be of significant assistance in facilitating the movement of these

important commodities and easing inflationary pressures in these industries.

Sincerely,

/s/ James W. McLane
JAMES W. MCLANE
Deputy Director

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC., ET AL., PLAINTIFFS

v.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, DEFENDANTS

AFFIDAVIT

I, Thomas J. Byrne, being duly sworn state the following:

I am Chief of the Section of Railroads at the Interstate Commerce Commission, and am also a member of the Railroad Service Board at the Commission. I have been in the position of Chief of the Section of Railroads for three years, and in all have twenty six years of service with the Interstate Commerce Commission. I have also been employed for eighteen years with the Reading Railroad. I am fully familiar with the railroad industry, and with the current operating situation regarding the freight car fleet generally and lumber transportation specifically.

On April 25, 1973, the Railroad Service Board recommended to Division 3 of the Interstate Commerce Commission that a service order be issued restricting the privilege of reconsigning carload shipments of lumber at the balance of the through rate applicable from loading point to ultimate destination to those shipments which had been held at hold or reconsigning points five days or less.

Approximately 50 percent of western lumber is loaded and shipped to a hold and reconsigning point prior to being sold to the ultimate consumer. The tariffs permit reconsigning of this lumber after arrival at hold point subject only to a nominal reconsigning charge and demurrage for detention in excess of 24 hours after notice of arrival is sent or given. Other non-perishable traffic is not ordinarily subject to reconsignment at through rates after arrival at billed destination.

Field reports had disclosed excessive delays to such cars at various hold points. For example, at Beloit, Kansas, on the Union Pacific Railroad, 150 cars out of 447 cars diverted were held in excess of the free time allowed. Individual car detention ranged as high as 22 days (21 days after free time). Fifty-one of the cars held at Beloit during March 1973 would have been subject to the proposed order had it been in effect during that period.

On April 5, 1973, there were 19 cars of lumber held at Beloit for reconsignment—all held in excess of five days. The oldest car had been idle at Beloit for 20 days. Similar examples of excessive car delays to shipments of "hold lumber" had been reported over extended periods by our field personnel.

Prior to the issuance of Service Order No. 1134, field checks disclosed that the average detention of cars of lumber and plywood at hold points was approximately ten days. Individual car delays of 20 to 30 days were frequently found. Checks made subsequent to the issuance of Service Order No. 1134 indicate that the average detention at hold point is now less than five days and that fewer cars are held by shippers a sufficient time to require the assessment of local rates to and from the hold point as provided by the order.

This improved performance represents a substantial improvement in car utilization, a substantial reduction in the turn time on cars used in this traffic, and increased availability of such cars for subsequent shipments.

At the time Service Order No. 1134 was submitted to Division 3 for consideration, the average daily shortages of 40-ft. wide-door, plain boxcars were 651 cars;

of 50-ft. plain boxcars, 2,234 cars. These are the two car types most commonly used for loading of lumber, plywood, and related articles.

Active assistance was being given to the primary origin railroads—the Burlington Northern; Chicago, Milwaukee, St. Paul and Pacific; Southern Pacific; and the Union Pacific—in the form of orders issued by the Car Service Division of the Association of American Railroads, directing the return to owners of cars of these types owned by these two railroads.

In addition, there was a Commission service order in effect—Service Order No. 1132—requiring all carriers to return empty to the Southern Pacific all cars owned by the Evergreen Freight Car Corporation. This fleet of 3,209 50-ft. plain boxcars was built by Evergreen, a wholly-owned subsidiary of the Southern Pacific, for the transportation of lumber and plywood originating on its lines in Oregon and northern California. Normally, these cars are also used for westbound loading from eastern points in order to avoid excess empty mileage and to avoid the accumulation of excessive numbers of cars of this type on the West Coast.

However, at this time the need for these cars was so great as to require their return to the SP, an action which expedited their return to the lumber territory but also had the effect of forcing additional cars to move loaded to the West Coast where, after release, they also became available for reloading with lumber, plywood, etc.

On June 30, 1973, the average daily shortages of plain 40-ft. wide-door boxcars reported by the carriers were 580 cars; of 50-ft. plain boxcars, the average daily shortages were reported to be 2,351, indicating continued

heavy demands for these cars, in excess of supplies, by shippers throughout the country.

/s/ Thomas J. Byrne
THOMAS J. BYRNE

Subscribed and sworn to before me this 20th day of July, 1973.

/s/ Wm. F. Luker
WM. F. LUKER
Notary Public for the
District of Columbia

My Commission Expires June 14, 1977.

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-286

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; and AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION,
DEFENDANT-INTERVENOR

MEMORANDUM OF DECISION

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges [1]

STATEMENT OF THE CASE

On May 8, 1973, the intervenor Interstate Commerce Commission (Commission), basing its action on the provisions of 49 U.S.C. § 1(15), sua sponte, and without notice and hearing, issued its so-called Service Order No. 1134 (Order). The Order has been from time to time continued and is now in effect.

---

[1] Honorable Alfred T. Goodwin, United States Circuit Judge for the Ninth Circuit, Honorable William G. East, Senior United States District Judge for the District of Oregon, and Honorable Otto R. Skopil, Jr., United States District Judge for the District of Oregon, constituting a statutory three-judge district court by designation of Chief Judge Richard H. Chambers for the Ninth Circuit, dated May 25, 1973.

The plaintiffs instituted these proceedings pursuant to 28 U.S.C. §§ 2321-2325 to annul and enjoin the enforcement of the Order contending, *inter alia*, that:

While the Order purports to deal with car service, it in truth and in fact deals with transportation charges over which the Commission has no authority under § 1 (15) to change in the manner attempted by the Commission; and the Order issued without notice or hearing or good cause shown, suspends regularly and duly filed tariffs of the Commission "relating to joint and through [railroad shipping] rates for lumber and plywood in violation of 49 U.S.C. § 6(3) [sic]." [49 U.S.C. § 15(1)]

JURISDICTION

We note the jurisdiction of this three-judge district court under 28 U.S.C. §§ 2321-2325.

FACTS

We find from the agreed statement of facts and the affidavits filed herein these pertinent facts: Plaintiffs are Oregon corporations all engaged in the wholesale lumber business. In their business, they cause lumber and plywood purchased and sold by them to be transported from their sources of supply to their customers throughout the United States. The rates charged by railroads for transportation of lumber and plywood affect to a large extent the rate of economic activity in the Northwest and the impact of such rates is vital to the economy of the region and the plaintiffs.

Approximately 75 per cent of all the lumber and plywood produced in the Northwestern states is sold through the wholesale arm of the lumber industry. For almost half a century the wholesalers have used a common practice of some form of a diversion or reconsignment of their railroad car shipments while in route from point of origin to or at the original destination under prefixed joint or through railroad shipment rates and charges established under duly filed tariffs as regulated by the Commission under its general powers and appropriate

procedure under the Interstate Railroad Transportation Act, after notice and hearing.

In recent years the practice is generally known as wholesalers' sales-in-transit. The wholesaler will ship a given carload or carloads to a given "hold point" with the view that the car or cars will be ultimately diverted or reconsigned to a more distant point of final destination. The railroad joint or through shipping rate from the point of origin to the ultimate final destination is always substantially less than the combined or aggregate of short haul rates between intermediary points. For example, the through rate for a 7500 lb. minimum carload from Pacific Coast shipping points to New York, via the intermediate points of Marshalltown, Iowa, and Chicago, Illinois, is $1432.50, while the aggregate of the three local rates between points totals $2452.00.

The Order applies only to the transportation of lumber and plywood by railroads and provides that in the event carload shipments are held at a transit point more than 120 hours, exclusive of Saturdays, Sundays and holidays, and thereafter forwarded to another destination, or delivered to a newly designated consignee, such shipment will lose the benefit of any applicable through rate from the shipping point to the ultimate designation. Such shipment would be subject to the sum of the local rates which are as pointed out above usually substantially greater in amount.

The railroads of the United States have been struggling with the problem of boxcar shortages, particularly as they affect the lumber and plywood industries, for over fifty years, and the Commission has issued hundreds of Service Orders under 49 U.S.C. § 1(15) in an attempt to alleviate the problem caused by boxcar shortages. However, the Commission has never in the past issued an order pursuant to the claimed authority of 49 U.S.C. § 1(15), which imposed the severe sanctions upon shippers as contained in the Order, or which purported to affect the rights of shippers to make use of a joint or through rate in effect pursuant to a duly filed and authorized tariff. In comparison, the imposition of tariff regulated reasonable time based demurrage charges for cars held

at a given point over stated times has been a traditional sanction upon shippers to keep the cars rolling.

ISSUE

Whatever authority the Commission may have to alleviate the problem of car shortages by prescribing shipping rates and charges through appropriate procedures, with notice and hearing, is not in issue. The basic and sole issue before the court is whether the Commission had Congressional authority under the "emergency" car service section, Title 49 U.S.C. § 1(15), to promulgate and issue the so-called "car service" Order. We hold that it did not.

DISCUSSION

The authority of the Commission over "car service items" flows from 49 U.S.C. § 1(10), which provides in essential parts, "The term 'car service' * * * shall include the use, * * * movement * * *, and return of * * * cars * * * used in the transportation of property *by any carrier by railroad.* * * *" [Emphasis added.] So it follows that " 'car service' connotes the use to which the vehicles of transportation are put [by a carrier]; not the transportation service rendered by means of them." *Peoria & P.U. Ry. Co.* v. *United States*, 263 U.S. 528, 533 (1924).

Paragraph (14) of § 1 is the enabling section or procedural prerequisite for the issuance of the Commission's car service orders. The purpose of car service orders is best explained in *United States* v. *Allegheny-Ludlum Steel Corp.*, 406 U.S. 472, 743-744 (1972), through this observation of Mr. Justice Rehnquist:

> "The country's railroads long ago abandoned the custom of shifting freight between the cars of connecting roads, and adopted the practice of shipping the same loaded car over connecting lines to its ultimate destination. The freight cars of the Nation thus became in essence a single common pool, used by all roads. This practice necessarily required some arrangements for eventual return of a freight car to the lines of the road which owned it, and in 1902 the railroads through their trade association dealt with this and related problems in a code of car service rules with which the roads agreed among themselves to comply. The effect of the Commission's order now under review is to promulgate two of these rules as the Commission's own, with the result that sanctions attach to their violation *by the railroads.* [Emphasis added.]
>
> "Because of critical freight-car shortages experienced during World War I, Congress enacted the Esch Car Service Act of 1917, which empowered the Commission to establish reasonable rules and practices with respect to car service by railroads, 40 Stat. 101, 49 U.S.C. § 1(14)(a). The pertinent language of that Act provides:
>
> " 'The Commission may [after hearing] * * * establish reasonable rules, regulations, and practices with respect to car service by common carriers by railroad subject to this chapter * * *.' " ["including the compensation to be paid * * * for the use of any * * * car * * * not owned by the carrier using it. * * *"]

So we emphasize that § 1(14) contemplates Commission rules and regulations, with respect to car service, applicable with sanctions, to uses of cars *by railroads* and not by shippers.

Section 1(15) gives the Commission four categories of emergency authority when it is of the opinion that shortages of equipment or other emergencies requiring immediate action exist, at once, with or without notice or hearing:

"(a) to suspend * * * rules, regulations, or practices *then existing* [emphasis added] with respect to car service * * *,

(b) to make * * * directions with respect to car service * * * during such emergency as * * * will promote * * * service * * * [and provide compensation *as between carriers*].

(c) to require * * * common use of terminals, * * * and

(d) to give directions * * * for preference or priority in transportation. * * *"

Manifestly the expressed authority to the Commission under either of categories (b), (c) or (d) does not support the Order under challenge. Nor does the expressed authority under category (a) give any validity to the Order. The Order does not purport to suspend any rule, regulation or practice then established in connection with car service. On the contrary the Order condones the practice of sales-in-transit, which involves a form of boxcar warehousing for an indefinite time until a diversion or reconsignment occurs but requires shippers employing this practice to pay a higher ultimate shipping rate to the carriers.

Expressed authority to the Commission for fixing shipping rates and charges during a declared emergency under § 1(15) is utterly lacking and none can be rationally inferred or implied from the express language. It has been held that the "sole purpose" of categories (a) and (b) authority is "to make [railroad cars] available in emergencies to a carrier other than the owner. * * *" *Peoria & P.U. Ry. Co.* v. *United States*, supra, at 533, 534. Also, the section is no general grant of emergency power to prevent interruptions in traffic "and the detail in which the subjects of such power has been specified precludes its extensions to other subjects by implication." 263 U.S. at 535.

The intervenor urges the holding of *Turner, Dennis & Lowry Lbr. Co.* v. *Chicago, M. & St. Paul Ry. Co.*, 271 U.S. 259 at 262, as supportive of the Order. *Turner* did not involve and approve an order issued under § 1 (15), but rather an order involving a "demurrage tariff duly filed." The decision is no authority for the Order challenged herein.

In summary, we point out that the sole purpose and effect of the Order is to deprive lumber and plywood shippers of the benefit of a long-standing railroad shipping practice, approved under prior lawful rate regulation procedures, and the further benefit of the pre-existing joint and through shipping rates provided therefor; and in turn to substitute for such joint and through rates a combination or aggregate of the local rates between intermediary points resulting in the imposition of sanctions, which approach confiscatory amounts.

The Service Order label and citation of authority therefor does not mask or legitimatize the illegal rate fixing Order developed through procedures lacking due process.

Conclusions of Law

We conclude that the Commission was without Congressional authority to issue the Order under the provisions of § 1(15) and acted arbitrarily and unlawfully in the formation and issuance thereof and that the Order is void from its inception. Accordingly, the plaintiffs are entitled to an Order and Decree herein:

(a) setting aside, vacating and holding for naught the Order in its entirety as of its inception;

(b) restraining and enjoining the Commission and all persons acting on its behalf from the enforcement of the terms and sanctions imposed thereunder; and

(c) allowing plaintiffs' costs.

This Decision shall constitute the court's Findings of Fact and Conclusions of Law as provided in Rule 52(a), Federal Rules of Civil Procedure.

Dated this 18th day of October, 1973.

/s/ Alfred T. Goodwin
United States Circuit Judge

/s/ William G. East
United States District Judge

/s/ Otto R. Skopil, Jr.
United States District Judge

[Endorsed: Filed Oct. 18, 1973, Robert M. Christ, Clerk, By C. Mundorff, Deputy]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil No. 73-286

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA, DEFENDANT

and

INTERSTATE COMMERCE COMMISSION
DEFENDANT-INTERVENOR

DECREE

Before: GOODWIN, Circuit Judge, and EAST and SKOPIL, District Judges

Based upon the Memorandum of Decision, constituting the court's Findings of Fact and Conclusions of Law, filed herein contemporaneously herewith,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that:

(1) The Service Order No. 1134 entered by the Interstate Commerce Commission, Division 3, at its session on the 3rd day of May, 1973, in Washington, D.C., under the title of Part 1033-Car Service, in its entirety, is set aside, vacated and held for naught as of its entry;

(2) The Interstate Commerce Commission and all persons acting for and on its name and behalf are permanently restrained and enjoined from the enforcement of said Order in part or its entirety; and

(3) The plaintiffs have and recover costs herein.

Dated this 18th day of October, 1973.

/s/ ALFRED T. GOODWIN
United States Circuit Judge

/s/ WILLIAM G. EAST
United States District Judge

/s/ OTTO R. SKOPIL, JR.
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

Civil Action No. 73-386

OREGON PACIFIC INDUSTRIES, INC.; ARTHUR A. POZZI CO.; TIMBERLANE LUMBER CO.; CHAPMAN LUMBER CO.; NORTH PACIFIC LUMBER CO.; AND AMERICAN INTERNATIONAL LUMBER CO., PLAINTIFFS

v.

UNITED STATES OF AMERICA and
INTERSTATE COMMERCE COMMISSION, DEFENDANTS

NOTICE OF APPEAL

1. Notice is hereby given that the Interstate Commerce Commission, one of the defendants in the above-entitled action, hereby appeals to the Supreme Court of the United States from the opinion and order of this Court dated October 18, 1973. This appeal is taken pursuant to 28 U.S.C. § 1253.

2. The entire record in this action is hereby designated for certification by the Clerk of the District Court to the Clerk of the Supreme Court. The Clerk of the District Court is requested to prepare and to transmit the entire record to the Clerk of the Supreme Court.

This 14th day of December, 1973.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney
INTERSTATE COMMERCE
COMMISSION
Washington, D.C. 20423

/s/ Fritz R. Kahn/C.W.
FRITZ R. KAHN
General Counsel

CERTIFICATE OF SERVICE

I hereby certify that on this, the 14th day of December, 1973, I served copies of the foregoing Notice of Appeal on counsel for all parties of record by first-class, air-mail, postage prepaid.

/s/ Charles H. White, Jr.
CHARLES H. WHITE, JR.
Attorney

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